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19 and Miguel A. Alvarez

20  
21 UNITED STATES DISTRICT COURT  
22  
23 NORTHERN DISTRICT OF CALIFORNIA

24  
25 ROANE HOLMAN, NARCISCO  
26 NAVARRO HERNANDEZ and MIGUEL  
27 A. ALVAREZ on behalf of all others  
similarly situated,

28 Plaintiff,

v.

EXPERIAN INFORMATION  
SOLUTIONS, INC.

Defendant.

Case No. 11- cv-0180-CW (DMR)

PLAINTIFFS' NOTICE OF MOTION AND  
MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT

Date: June 5, 2014

Time: 2:00 pm

Oakland Federal Court Bldg.

Courtroom 2, 4th Floor

Judge: Hon. Claudia Wilken

## NOTICE OF MOTION

To defendant, Experian Information Solutions, Inc., and its counsel of record:

Please take notice that on June 5, 2014 at 2:00 p.m. before Judge Claudia

Wilken of the above-entitled court, at 1301 Clay Street, 4th Fl., Courtroom 2, Oakland, California 94612, class representatives Roane Holman, Narcisco Navarro Hernandez and Miguel Alvarez will move for preliminary approval of the proposed settlement in this case, subject to a hearing on the final approval of the settlement.

This motion is based on this notice of motion and motion, the accompanying memorandum, and the declaration of Andrew J. Ogilvie and exhibits thereto.

## I. INTRODUCTION

Plaintiffs sued Experian for willfully violating the Fair Credit Reporting Act by furnishing consumer reports to Finex, a collection agency, when Finex lacked a permissible purpose to obtain the reports. The certified class is comprised of persons whose consumer reports Experian sold to Finex between January 12, 2009 and the present, whose towing transactions were nonconsensual, whose obligations were not reduced to judgment and who have not filed bankruptcy.

If the jury were to find that Experian willfully violated the FCRA, it could award each class member \$100 to \$1,000 in statutory damages. 15 U.S.C. § 1681n. Under the settlement, each class member who submits a valid claim will likely receive \$375. Because Experian insisted upon a cap of \$8 million for its total exposure, theoretically there could be so many claims that a pro-rata reduction could be required, but plaintiffs believe that is highly unlikely. Judging from the percentage of potential class members who have submitted claims in similar cases, it is likely that each claimant will receive the full \$375 and there will be enough money to pay the settlement administrator and whatever the Court awards in incentives, attorneys' fees

1 and expenses, without exceeding the \$8 million cap.

2        Each claimant must attest to their entitlement to be paid. Plaintiffs spent many  
3 hours analyzing Finex's documents trying to avoid the need for individual testimony,  
4 but Finex's documents did not solve that problem. Plaintiffs argued that the FCRA  
5 makes Experian liable to each person on Finex's list, but they lost that argument. If  
6 the case were tried, each person might have to testify in person in order to receive any  
7 payment. This settlement avoids that considerable burden on the class and the Court.

8        **A. Factual Background**

9        This case arises from Experian's response (or non-response) to the Ninth  
10 Circuit's decision in *Pintos v. Pacific Credit Ass'n*, 504 F.3d 792 (9th Cir. 2007) and  
11 its progeny. The Court is familiar with the facts. See Documents 32, 138 & 226.

12        **B. Procedural History**

13        The factual record has been fully developed through three years of contentious  
14 litigation. The electronic filing system reflects nearly 250 entries.

15        After the Court denied Experian's motion to dismiss, Holman obtained  
16 informal discovery from Finex and learned the details of its communications with  
17 Experian concerning *Pintos* and its intended use of the reports. Holman obtained a  
18 class list and many thousands of pages of Finex documents relating to the underlying  
19 towing claims. Alvarez and Navarro Hernandez joined Holman as plaintiffs and they  
20 served written discovery and deposed numerous Experian employees. Experian  
21 deposed all three named plaintiffs, Holman's mother, and the owners of Finex. Both  
22 sides deposed the other sides' experts.

23        Experian vigorously opposed plaintiffs' class certification motion, arguing  
24 that the Finex list was over-inclusive and that the class could not be ascertained.  
25 Experian argued that each putative class member would have to testify, which would  
26

1 require years of trial. Experian challenged plaintiffs' adequacy and made legal  
 2 arguments regarding willfulness. The Court rejected Experian's arguments and  
 3 certified the class. Document 136. Later, it denied Experian's request for  
 4 reconsideration but amended the class definition slightly. Documents 144 & 146.

5 There have been scores of disputes over discovery and claims of  
 6 confidentiality of documents. See Documents 46-50, 53, 65, 75-80, 83, 84, 93, 103,  
 7 100, 104, 108, 117-118, 121, 119-120, 122, 123-124, 128, 135, 137, 152-157, 160 &  
 8 161, 171, 173-175, 177, 179, 180, 181, 183-185.

9 Experian moved for summary judgment and to decertify the class. It again  
 10 argued that its violations were not willful and that the class is unascertainable and  
 11 unmanageable. Document 186. The Court denied its motions, but also rejected  
 12 plaintiffs' argument on the class definition, holding that liability must be determined  
 13 "on a consumer-by-consumer basis." Document 226, p. 22. Magistrate Judge Ryu  
 14 renewed the settlement discussions and was able to broker a settlement.

### 15       C.     Chronology of Settlement Discussions

16       The parties attended an early mediation at JAMS that accomplished little. The  
 17 case was referred to Magistrate Judge Ryu for a settlement conference that was held  
 18 on March 1, 2013. The parties reached agreement on some issues, but not all. The  
 19 impasse remained after the next settlement conference and after numerous phone  
 20 conversations between Magistrate Judge Ryu and the parties. Documents 198-205.

21       The parties completed the briefing of Experian's motions, which the Court  
 22 denied on September 12, 2013. Magistrate Judge Ryu then renewed settlement  
 23 discussions. Document 234. At the December 19, 2013 settlement conference the  
 24 parties reached an agreement in principle but had to use JAMS Judge James Warren  
 25 in late February 2014 to reach agreement on the settlement documents. The parties

1 have now signed the settlement agreement.

2 **II. SUMMARY OF THE PROPOSED SETTLEMENT**

3 The proposed settlement (Exhibit 1 to Ogilvie declaration) will provide cash  
4 payments to everyone who meets the class definition and who submits a valid claim.

5 The class definition is:

6 All consumers whose consumer reports were furnished by Experian to Finex  
7 from January 12, 2009 to the present, in connection with Finex's efforts to  
collect on a towing deficiency claim that was not reduced to judgment and  
8 was not the result of a transaction that the consumer initiated. Individuals who  
subsequently filed for bankruptcy are excluded from the class.

9 Experian will pay up to \$375 to each class member who timely submits a  
10 properly completed and verified claim form. The claim form (Exhibit 3 to Ogilvie  
11 declaration) requires each claimant to establish that they are a member of the class.  
12 Each claimant must indicate that they owned a vehicle that was towed, that they did  
13 not initiate the towing transaction, and that the debt was not reduced to judgment. To  
14 prevent fraudulent claims, Experian demanded a procedure to verify that the person  
15 submitting the claim is the person whose report was furnished to Finex. Thus the  
16 form requires each claimant to provide either (i) the month and year of their birth or  
17 (ii) the last four digits of their social security number.

18 Kurtzman Carson Consultants, LLC (KCC), an independent settlement  
19 administrator, will administer the settlement. KCC is authorized to follow up with  
20 class members who do not provide all the required information or who forget to sign.  
21 Claims that are rejected will go to an Ombudsman for final decision unless class  
22 counsel concludes that there are no grounds to contest KCC's denial of the claims.  
23 The parties agreed to Judge Warren as Ombudsman, who agreed to that role.

24 The \$8 million cap covers the payment of the class members' claims, the  
25 settlement administrator's charges, incentive awards of up to \$10,000 to each named  
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1 plaintiff, and class counsel's fees and expenses of up to \$2,250,000.

2 The Settlement Agreement contains two different releases of claims. The  
 3 class members' release is narrow. In exchange for the cash payments, each class  
 4 member releases their claims that arise from Experian's furnishing of consumer  
 5 reports to Finex. The class representatives will give Experian a broad release of all  
 6 claims, whether or not those claims relate to the reports Experian sold to Finex.

7 **III. THE COURT SHOULD ENTER AN ORDER GIVING PRELIMINARY  
 8 APPROVAL TO THE PROPOSED SETTLEMENT.**

9 **A. There is no concern about the suitability of class treatment because  
 10 the Court has already certified the class**

11 Settlement approval that takes place before a class is certified requires a  
 12 higher standard of fairness. See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th  
 13 Cir. 1998). That is not a concern here because the Court has already analyzed the  
 14 suitability of the case for class treatment and has certified the class.

15 **B. The proposed settlement is fair, adequate and reasonable.**

16 Rule 23(e) requires the Court to determine whether a proposed settlement is  
 17 "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938,  
 18 959 (9th Cir.2003). To make this determination, the Court must consider a number  
 19 of factors, including: (1) the strength of plaintiffs' case; (2) "the risk, expense,  
 20 complexity, and likely duration of further litigation;" (3) "the risk of maintaining  
 21 class action status throughout the trial;" (4) the amount offered in settlement; (5) the  
 22 extent of discovery completed, and the stage of the proceedings; (6) the experience  
 23 and views of counsel; (7) the presence of a governmental participant; and (8) the  
 24 reaction of the class members to the proposed settlement. See *id.* (citations omitted).  
 25 In addition, the settlement may not be the product of collusion among the negotiating

1 parties. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir.2000). Courts  
 2 must give “proper deference to the private consensual decision of the parties,” since  
 3 “the court’s intrusion upon what is otherwise a private consensual agreement  
 4 negotiated between the parties to a lawsuit must be limited to the extent necessary to  
 5 reach a reasoned judgment that the agreement is not the product of fraud or  
 6 overreaching by, or collusion between, the negotiating parties, and that the  
 7 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”  
 8 *Hanlon*, 150 F.3d at 1011.

9 The Court will not be able to fully assess some of these factors until the  
 10 Fairness Hearing, so “a full fairness analysis is unnecessary at [the preliminary  
 11 approval] stage.” *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D.Cal.2008). Rather,  
 12 at the preliminary approval stage, the Court need only review the parties’ proposed  
 13 settlement to determine whether it is within the permissible “range of possible  
 14 judicial approval” and thus, whether the notice to the class and the scheduling of the  
 15 formal fairness hearing is appropriate. See 4 William B. Rubenstein et al., *Newberg*  
 16 on *Class Actions* § 11:25 (4th ed.2002). Preliminary approval is appropriate: “[i]f (1)  
 17 the proposed settlement appears to be the product of serious, informed, noncollusive  
 18 negotiations, (2) has no obvious deficiencies, (3) does not improperly grant  
 19 preferential treatment to class representatives or segments of the class, and (4) falls  
 20 with the range of possible approval.” *Vasquez v. Coast Valley Roofing, Inc.*, 2009  
 21 WL 3857428, at \*7 (E.D.Cal. 2009).

22 Here, the proposed settlement is fair, adequate and reasonable. The parties  
 23 engaged in protracted arm’s length settlement negotiations over the course of many  
 24 months. Ogilvie dec., ¶6. The proposed settlement was reached only after the parties  
 25 had completed discovery and were on the verge of trial. Plaintiffs knew what the  
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1 evidence would show and had conducted focus groups to determine how a jury might  
 2 react to the case. Ogilvie dec., ¶ 6. This settlement is the result of informed thought  
 3 and deliberation by both sides.

4 There has been no collusion. Counsel for the opposing parties have clashed  
 5 about virtually everything from the start. Ogilvie dec., ¶¶ 2-3.

6 The proposed settlement does not improperly grant preferential treatment to  
 7 the class representatives. The class representatives worked unusually hard in this case  
 8 and made significant personal sacrifices for the benefit of the class. Ogilvie dec., ¶ 7.  
 9 The proposed incentive awards are to compensate them for those contributions to the  
 10 class and for their release of all claims they may have against Experian. *Id.* The Court  
 11 has discretion to determine the appropriate amount of any incentive awards and the  
 12 amounts awarded for class counsel's fees and costs.

13 **C. Preliminary Approval Will Trigger Notice to the Certified Class**

14 The settlement provides that KCC will send written notice to all class  
 15 members who can be located. The agreed upon form of Notice is Exhibit 2 to the  
 16 Ogilvie declaration. The Notices, in English and Spanish, will be sent by first-class  
 17 mail to the most current addresses available. KCC will use reasonable efforts to  
 18 locate putative class members who have moved or been lost.

19 **D. The proposed notice satisfies Rule 23's content requirements.**

20 Rule 23(c)(2)(B) requires the Notice to state clearly and concisely in plain,  
 21 easily understood language (i) the nature of the action, (ii) the definition of the class  
 22 certified, (iii) the class claims, issues, or defenses, (iv) that a class member may enter  
 23 an appearance through an attorney if the member so desires, (v) that the court will  
 24 exclude from the class any member who requests exclusion, (vi) the time and manner  
 25 for requesting exclusion, and (viii) the binding effect of a class judgment on members  
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1 under Rule 23(c)(3). *Mullane v. Cent. Hanover Bank.*, 339 U.S. 306, 314 (1950).

2 The Notice that the parties have agreed upon satisfies these requirements. It is  
 3 written in plain English and covers all the points that must be covered to comply with  
 4 the Rule's requirements. It is long because there is a great deal of information that  
 5 must be conveyed to the putative class.

6 **E. Mailed notice is the best notice practicable**

7 Notice by mail is the best and most practicable way to notify the class about  
 8 this case and the settlement. Finex kept a list of every person whose report it  
 9 obtained during the class period. Using that list as the starting point, Experian will  
 10 use its database to update the putative class members' addresses and will provide that  
 11 updated address list to KCC. KCC will mail the notice to the addresses on that list  
 12 and, for all notices that are returned, it will make reasonable efforts obtain better,  
 13 more current addresses. KCC will mail the notices via first-class mail.

14 **F. The time for objections does not end until after all claims have  
 15 been received and the class members can learn how much each  
 16 person will receive.**

17 The settlement is structured so the claims period ends well before the Final  
 18 Approval hearing. When the claims period has closed, KCC will tell the parties and  
 19 the Court how many valid claims have been submitted. By multiplying the number  
 20 of valid claims by \$375, one can determine whether the \$8 million cap is enough pay  
 21 all claimants at the rate of \$375 and still have enough money left to pay the  
 22 settlement administration costs, plus the full amounts requested for incentive awards,  
 23 attorneys' fees and expenses. This information will be posted on KCC's website for  
 24 this case and class members will have an opportunity to object if they wish to do so.  
 25 Class counsel, having investigated the percentage of claims submitted in other cases,

1 believes that it is highly unlikely that the cap will be exceeded.

2 **IV. CONCLUSION**

3 For the foregoing reasons, plaintiffs and class representatives Holman,  
4 Alvarez, and Navarro Hernandez, through class counsel, respectfully request the  
5 Court to enter its order of preliminary approval of the settlement, subject to a hearing  
6 on the final approval.

7 Respectfully submitted this 27th day of March, 2014.

8 ANDERSON, OGILVIE & BREWER LLP  
9 and  
10 LAW OFFICE OF BALÁM O. LETONA, INC.

11 By: /s/ Andrew J. Ogilvie  
12 Andrew J. Ogilvie